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No. 84-1135

In the Supreme Court of the United States

OCTOBER TERM, 1984

COMMISSIONER OF TRANSPORTATION OF THE STATE OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
Acting General Counsel

ELLEN D. HANSON
Associate General Counsel

EVELYN G. KITAY
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

QUESTION PRESENTED

Whether the Interstate Commerce Commission's decision permitting Greyhound to increase its intrastate bus rates in New York was authorized by the Bus Regulatory Reform Act of 1982.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 750 F.2d 163. The decisions of the Interstate Commerce Commission (Pet. App. 18a-25a) and the New York Department of Transportation (Pet. App. 26a-39a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 40a) was entered on September 18, 1984. Justice Marshall extended the date for filing a petition for a writ of certiorari to and including January 14, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Bus Regulatory Reform Act of 1982 (Bus Act), 49 U.S.C. 11501(e), Congress authorized the Interstate Commerce Commission to preempt state regulation of certain intrastate rate proposals of interstate bus carriers.[1] Congress was concerned that state regulation had contributed to the inadequate performance of the bus industry in recent years. S. Rep. 97-411, 97th Cong., 2d Sess. 7-8 (1982); H. R. Rep. 97-334, 97th Cong., lst Sess. 24 (1981). Congress noted that "a large number of * * * intrastate routes * * * are cross-subsidized by more profitable interstate routes and charter operations" and that "the carrier who must cross-subsidize its intrastate route is unfairly charging its interstate travelers an inequitable price." H.R. Rep. 97-334, *supra*, at 25; see *id.* at 44; S. Rep. 97-411, *supra*, at 8-11. Congress also observed (*id.* at 7-8):

> State regulatory restrictions on entry, exit, and/or service frequency, and slow action by State regulatory commissions on fare increases, often have significant adverse impacts on intercity bus operations. Thus, these actions impose an unreasonable burden on interstate commerce and must be preempted.

Accordingly, 49 U.S.C. 11501(e) was enacted to "create[] a mechanism to remedy situations where State actions are creating an unreasonable burden on interstate commerce." H.R. Conf. Rep. 97-780, 97th Cong., 2d Sess. 52 (1982). See also S. Rep. 97-411, *supra*, at 5, 28. That provision limits state authority to review the intrastate rate proposals of

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[1]States retain full authority over the rates of bus carriers owned or controlled by a state or local government and over the rates of solely intrastate carriers. Until the Bus Act was enacted, states had full authority to regulate the intrastate rates of interstate carriers as well. See Pet. 6.

interstate carriers to a 120-day period. The ICC obtains jurisdiction:

> if * * * the request has been denied (in whole or in part) or the State authority has not acted finally (in whole or in part) on the request by the 120th day after the carrier made the request * * *.

49 U.S.C. 11501(e)(1)(A). Once the Commission has jurisdiction, it "shall" prescribe a rate, rule, or practice if it finds that the one in effect "causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce." 49 U.S.C. 11501(e)(1)(B). Action taken under 49 U.S.C. 11501 "supersedes State law or action taken under State law in conflict with the action of the Commission." 49 U.S.C. 11501(f).

The provision directly at issue in this case, 49 U.S.C. 11501(e)(2)(A)(i), further provides that the ICC shall presume a burdening of interstate commerce where the intrastate fare is lower than an interstate fare for comparable services.[2] This presumption is, however, rebuttable. Thus, once the carrier establishes that its intrastate fares are lower than its interstate fares for comparable transportation,[3] the

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[2]References to the Section 11501(e) presumption herein mean only the presumption that arises where the intrastate fares are lower than the fares for comparable interstate services, since that is the only presumption involved in this case. Section 11501(e) provides similar rebuttable presumptions where: (1) the carrier's revenues from the intrastate fares are less than the variable costs of providing the service, (2) the state agency fails to act on the intrastate fare request by the 120th day, or (3) the most recent intrastate general fare increase is less than the most recent general fare increase applicable to interstate traffic. See Pet. App. 8a-12a.

[3]Transportation may be "comparable" for purposes of the presumption not only when it involves an interstate trip of similar length to the intrastate one whose fare is at issue, but also—as here— when both trips are between the same points within the state, and the passenger who purchases the service as part of an interstate trip is charged a higher fare

burden shifts to the state or other objecting party to show that the rate disparity is justified. An objector may rebut the statutory presumption by demonstrating differences in operating conditions, services, or costs between the inter- and intrastate operations sufficient to justify the rate disparity. *E.g.*, Pet. App. 24a; *In re Greyhound Lines, Inc., for Review of a Decision of the West Virginia Public Service Commission Pursuant to 49 U.S.C. 11501,* 133 M.C.C. 382 (1984), aff'd *sub nom. Public Service Commission of West Virginia* v. *ICC,* 749 F.2d 32 (4th Cir. 1984).

2. This case involves the May 1983 application of Greyhound Lines, Inc. (Greyhound) to the New York Department of Transportation (NYDOT) for authority to increase its New York intrastate passenger fares. NYDOT suspended the proposed increase and conducted a hearing. At the hearing, Greyhound produced unrebutted evidence (see Pet. 8) that even with the full increase requested, intrastate fares would be below the rate for interstate fares for transportation between the same points.[4] Despite the rate disparity, an Administrative Law Judge denied the increase,

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than the passenger, travelling on the same bus between the same points, who purchases a ticket for a purely intrastate trip. See Pet. App. 15a; note 6, *infra.*

[4]As requested by NYDOT, Greyhound also produced various financial exhibits and earnings projections based on so-called "operating ratios." An "operating ratio" is a carrier's operating expenses expressed as a percentage of its revenues (Pet. 7 n.1; Pet. App. 3a). Greyhound's evidence showed that its national bus operations and its New York intrastate bus operations were currently losing money and that its New York interstate passenger services "were profitable and effectively subsidizing its unprofitable intrastate operations" (Pet. App. 4a). However, Greyhound's projected intrastate operating ratio, when adjusted for recent fare increases, showed that Greyhound's New York intrastate operations could become profitable—though still less so than its interstate operations in that state—in the coming year. See Pet. App. 3a-4a.

essentially because, as measured by operating ratios (see note 4, *supra*), "Greyhound's present operations within this State are profitable" (Pet. App. 35a).

Greyhound appealed the NYDOT decision to the ICC. The carrier invoked the statutory presumption, thus shifting the burden of proof to NYDOT to demonstrate that the rate disparity between comparable inter- and intrastate service in New York does not burden interstate commerce. In an attempt to meet its burden, NYDOT contended that (1) the operating ratio for Greyhound's intrastate operations is reasonable; (2) Greyhound has received subsidies (and significant recent fare increases) in New York State; and (3) Greyhound has been able to discontinue unprofitable operations in New York with minimal regulatory interference from NYDOT. See Pet. App. 21a-22a. Greyhound offered evidence in reply (Pet. App. 5a, 21a, 22a-23a).

3. After full consideration of the NYDOT record and the pleadings filed with the ICC, the Commission found that NYDOT's denial had resulted in intrastate rates that cause unreasonable discrimination against, and impose an unreasonable burden on, interstate commerce; consequently, the federal agency approved the increase (Pet. App. 18a-25a). The Commission applied the rebuttable presumption of Section 11501(e)(2)(A)(i), since it was undisputed that the intrastate passenger fares are (and will remain) lower than the fares for comparable interstate service (Pet. App. 24a). Because the record "does not document any differences in operating conditions or cost of service sufficient to justify this disparity" (*ibid.*), the State had failed to rebut that presumption. Consistently with past cases decided by the agency under the Bus Act (see Pet. App. 22a-23a, 42a-43a), the Commission found NYDOT's claim that Greyhound's intrastate operating ratio was reasonable was "not on point" (Pet. App. 24a). The Commission also concluded that the subsidy did not warrant denial

of the increase because it was not necessarily permanent, and—even with the subsidy included—Greyhound's intrastate fares in New York would still be lower than their interstate counterparts (*ibid.*).

4. On a petition for review, the court of appeals upheld the Commission's determination in all respects (Pet. App. 1a-17a). The court first found that the existence of a rate disparity, without more, is sufficient to invoke the statutory presumption provision (Pet. App. 6a-12a, 17a).[5] The court then rejected New York's argument, based on *North Carolina* v. *United States*, 325 U.S. 507 (1945), that the ICC's decisions to preempt the state authority must meet a "high standard of certainty." The court found that the rigid requirements of *North Carolina* do not apply to ICC decisions made under the Bus Act, in which Congress made a decision to allow substantial preemption of state authority. In view of the broad and explicit preemption authority involved, the court stated, review of these agency decisions is governed by the narrow "arbitrary [or] capricious" test in 5 U.S.C. 706. Pet. App. 13a-14a.

Turning to New York's attempts to rebut the presumption, the court found NYDOT's reliance on operating ratios misplaced, explaining that the computation of such ratios necessarily involves a number of "highly arbitrary accounting assumptions" used to allocate revenues and expenses between intra- and interstate operations (Pet. App. 15a). The court observed that allocations are necessary because a

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[5]The court rejected petitioner's argument that before invoking this presumption the ICC must find the existence of both one of the three criteria listed in subsection (A) of 49 U.S.C. 1150l(e)(2) and the criterion in subsection B. Petitioner does not challenge this holding here (Pet. 9 n. 2).

given bus typically contains both inter- and intrastate passengers.[6] Furthermore, it noted that the normal method for allocating expenses between inter-and intrastate operations is on the basis of passenger miles.[7] "The major problem with this method," however, is that many costs (such as ticketing, baggage handling and other station expenses) simply do not vary proportionately with the length of the trip (*ibid.*). Consequently, as the court pointed out, the actual cost per mile of shorter trips is typically significantly higher than that of longer ones. In short, operating ratios are "unreliable and insufficient to rebut Section 11501(e)(2)'s presumption" because intrastate trips are typically shorter than interstate trips and "the expenses allocated to the former are necessarily underestimated by an accounting method which assigns expenses on the basis of passenger miles." Pet. App. 15a-16a.

The court also rejected New York's argument that because it had allowed Greyhound to eliminate unprofitable routes with "minimal" difficulty and because Greyhound had "monopoly power" over certain areas of the state, the disparity between inter- and intrastate rates does not burden interstate commerce (Pet. App. 16a). Finally, the court found reasonable the Commission's conclusion that the possibility of a continuing subsidy was not sufficient to justify the existing rate disparity in this case (Pet. App. 17a).

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[6]Intrastate passengers include all persons whose passage does not take them across state lines. Thus, a person remains an intrastate passenger even though the bus on which he rides crosses state lines. See Pet. App. 3a n.1; S. Rep. 97-411, *supra*, at 7.

[7]A passenger mile is one mile travelled by one passenger. Thus ten passengers each travelling ten miles together would have travelled one hundred passenger miles (Pet. App. 15a n.6).

ARGUMENT

The thorough opinion of the court of appeals, upon which we rely, correctly affirmed the Interstate Commerce Commission's interpretation of its responsibilities in administering the Bus Act. The holding does not conflict with any decision of this Court or any other court of appeals. This case therefore presents no issue of general importance warranting this Court's review.

1. Petitioner principally argues (Pet. 10, 13-16) that the court below should have applied stricter judicial scrutiny, as called for by four decisions of this Court relating to ICC preemption of state *rail* ratemaking decisions.[8] But even assuming the current validity of those cases, the premise of petitioner's argument rests on equating the agency's current authority over intrastate bus rates with its authority over intrastate rail rates. In fact, however, subsequent amendments to the Interstate Commerce Act cast considerable doubt on the current validity of those cases even in the context in which they arose. The cited cases were decided between 1931 and 1958, and interpret former Section 13(4) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 13(4). Congress amended that statute to strengthen the ICC's hand in exercising jurisdiction over intrastate rail rates in the Transportation Act of 1958, Pub. L. No. 85-625, 72 Stat. 568 *et seq.* See, *e.g.*, S. Rep. 1647, 84th Cong., 2d Sess. 19-21 (1958). Then Section 214(a)-(c)(1) of the Staggers Rail Act of 1980, 49 U.S.C. 11501(b)-(d), vested the ICC with still more expansive preemptive authority over intrastate rail rates. Recognizing the effect of these statutory changes, several lower courts have found that the decisions

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[8] *North Carolina* v. *United States, supra; Public Service Comm'n* v. *United States*, 356 U.S. 421 (1958); *Chicago, M., St. P. & P. R.R.* v. *Illinois*, 355 U.S. 300 (1958); and *Florida* v. *United States*, 282 U.S. 194 (1931).

petitioner relies on are no longer controlling, even in rail ratemaking cases. See *Utah Power & Light Co.* v. *ICC*, 747 F.2d 721, 736 (D.C. Cir. 1984); *Texas* v. *United States*, 730 F.2d 339 (5th Cir. 1984), cert. denied, No. 83-2102 (Oct. 9, 1984); *Kentucky Utilities Co.* v. *ICC*, 721 F.2d 537, 542-543 (6th Cir. 1983); cf. *Wheeling-Pittsburgh Steel Corp.* v. *ICC*, 723 F.2d 346, 353 (3d Cir. 1983).

In any event, as petitioner itself concedes (Pet. 6, 16), the current intrastate rate provisions applicable to bus carriers are not the same as the comparable provisions applicable to rail carriers. Those differences are significant in this context. The burden is on the rail carrier to demonstrate that the State applied inappropriate standards in setting intrastate rail rates (49 U.S.C. 11501(c)). The Bus Act, by contrast, puts the burden of proof on the party objecting to the increase to justify a demonstrated disparity between inter- and intrastate fares. And the various presumptions in the Bus Act that, where applicable and unrebutted, direct a finding that interstate commerce is unreasonably burdened provide ample evidence of Congress's intent in the Bus Act to "allow substantial preemption of state regulatory authority" (Pet. App. 13a).

Accordingly, the cited decisions, reflecting an era when the regulation of intrastate rail transportation was "primarily the concern of the state"[9] and the ICC had *no* jurisdiction over intrastate bus fares (see Pet. 6), are not controlling. Petitioner's attempt to create a conflict with decisions of this Court, where none exists, should thus be rejected, as it was by the court below. The correct standard of judicial review to be applied to the Commission's decisions under Section 11501(e) is, as the court below stated (Pet. App. 14a), the deferential "arbitrary [and] capricious" standard

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[9] *North Carolina* v. *United States*, 325 U.S. at 511.

set forth in 5 U.S.C. 706(2)(A). See *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981); *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 806 (1973) (generally, judicial review of Commission rate cases is highly deferential).

2. Petitioner argues (Pet. 16) that under the Bus Act primary authority for setting intrastate rates remains with the states. Petitioner implies that even if the ICC disagreed with the state agency's rationale, it should not have upset NYDOT's decision so long as the state provided "some evidence" to rebut the statutory presumption. This argument, however, fundamentally misapprehends the legislative scheme. Nothing in the language of Section 11501(e) or the legislative history requires the ICC to defer to a state's determination. On the contrary, the Act reflects Congress's clear intent that intrastate services not be regulated differently from interstate services,[10] and that the ICC be permitted to preempt state actions it finds to be duplicative, wasteful or short-sighted. As discussed above, Congress expressly left it to the ICC to determine both when an intrastate rate constitutes an "unreasonable burden on interstate or foreign commerce" and when the statutory presumption in Section 11501(e)(2)(A)(i) has been rebutted. 49 U.S.C. 11501(e)(1)(B) and (2)(A)(i). Moreover, it provided that an action of the Commission taken under Section 11501 "supersedes State law or action taken under State law in conflict with the action of the Commission." 49 U.S.C. 11501(f). Clearly, there was no requirement that the ICC

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[10]In 49 U.S.C. 10101(a)(3), Congress directed the Commission to ensure that federal reforms are not nullified by state regulatory action. And in Section 17(d) of the Bus Act (49 U.S.C. 11501 note) (which was not codified) Congress expressly directed each state to revise its standards for intrastate bus rates, rules and practices to conform to federal standards.

accept NYDOT's arguments, which it found to be contrary to both the terms of the statute and the legislative intent.[11]

3. There similarly is no basis for petitioner's bald assertion (Pet. 11, 12, 18) that the ICC is improperly preempting state authority by increasing all intrastate fares which are lower than interstate fares without regard to the circumstances. The Commission fully recognizes that the statutory presumption is rebuttable and specifically found that NYDOT had failed to justify the disparity in these particular inter- and intrastate fares (Pet. App. 24a). Petitioner does not (and cannot) point to any language in this case, or others decided under Section 11501(e), implying that inter- and intrastate fares must *always* be equalized.[12]

In the final analysis, petitioner's argument is little more than an invitation to this Court to reweigh its rebuttal evidence. See Pet. 17. However, the Commission's position (Pet. App. 24a) that operating ratios are not probative is reasonable (see Pet. App. 15a-16a and pages 6-7, *supra*), and completely consistent with the Commission's approach in other cases decided (both before and after this case)

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[11]Congress could have provided that the ICC "consider" or even "give great weight" to the state's decision, but it did not. The absence of any such statutory requirement belies petitioner's argument that the ICC should defer to the state.

[12]Petitioner's assertion ignores the fact that only the Commission's decision in this case is properly before the Court. In any event, petitioner has grossly oversimplified the differing factual and legal circumstances underlying the decisions it relies upon. For example, *In re Virginia Stage Lines*, No. MC-59238 (Sub. No. 74) (Mar. 23, 1984), aff'd *sub nom. Auville* v. *ICC*, 747 F.2d 179 (4th Cir. 1984) (see Pet. 12) involved a petition to discontinue bus service under a statute (49 U.S.C. 10935) that is not at issue in this case. How the Commission allocates avoidable (*i.e.*, marginal) costs in such cases clearly is irrelevant to the rates matter before the Court.

under the Bus Act.[13] See *In re Greyhound Lines, Inc., for Review of a Decision of the West Virginia Public Service Commission Pursuant to 49 U.S.C. 11501, supra*; Pet. 11. The proper way to rebut the presumption, as the Commission explained (Pet. App. 24a), is to point to distinguishing features in operating conditions, services, or costs that would account for the rate disparity. The only evidence presented by NYDOT that is relevant to these factors is New York's subsidy to Greyhound. In this case, however, the subsidy was too limited and temporary to justify denying Greyhound the opportunity to bring its intrastate fares toward interstate levels (see Pet. App. 17a, 24a).

In sum, the Commission's decision that New York did not meet its burden of rebuttal was well within its broad discretion under the statute and is consistent with the intent of Section 11501 and Commission practice in other cases. Accordingly, the court of appeals' decision affirming the Commission's determination does not present questions of broad importance that warrant review by this Court.

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[13]Even in the railroad industry, operating ratio evidence long has been regarded as suspect because of the difficulties in allocating expenses between operations. See generally the dissent in *Public Service Comm'n* v. *United States*, 356 U.S. at 429-463 (Frankfurter, J.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

ROBERT S. BURK
Acting General Counsel

ELLEN D. HANSON
Associate General Counsel

EVELYN G. KITAY
Attorney
Interstate Commerce Commission

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